Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

BILLY SINCLAIR,

Petitioner,

v.

KELLY WARD, RICHARD P. IEYOUB,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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45 pp

QUESTIONS PRESENTED

1. Whether the State of Louisiana parole statutes, by providing that the Parole Board "shall" release a prisoner on parole, subject to certain restrictions, create a constitutionally protected, due process "liberty interest" in the parole decision making process under authority of Board of Pardons v. Allen, 482 U.S. 369, 107 S. Ct. 2415 (1987)?

2. Whether, absent a protected "liberty interest" in the parole process, a state prisoner nevertheless possesses standing, under certain circumstances, to challenge a parole denial based upon a violation of the Due Process Clause of the United States Constitution?

3. Whether an action commenced under 42 U.S.C. § 1983 can be dismissed as "frivolous" under 28 U.S.C. § 1915A when the issue presented by that action involves federally protected interests derived from United States Supreme Court precedent?

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The unpublished order of the United States Court of Appeals for the Fifth Circuit denying petitioner's "Petition for Rehearing *En Banc*" in Sinclair v. Ward, No. 99-30310, (5th Cir. February 1, 2000) is unreported, and is annexed hereto as Appendix A.

The unpublished decision of the United States Court of Appeals for the Fifth Circuit denying petitioner's appeal in Sinclair v. Ward, No. 99-30310, (5th Cir. December 27, 1999) is unreported, and is annexed hereto as Appendix B.

The unpublished judgment of the United States District Court for the Middle District of Louisiana (Hon. John V. Parker, presiding) dismissing petitioner's action in Sinclair v. Stalder, No. 98-688-A, (U.S Dist. Ct. for the Middle Dist. of La., March 25, 1999) is unreported, and is annexed hereto as Appendix E.

The unpublished ruling of the United States District Court for the Middle District of Louisiana (Hon. John V. Parker, presiding) dismissing petitioner's action in Sinclair v. Stalder, No. 98-688-A, (U.S. Dist. Ct. for the Middle Dist. of La., March 25, 1999) is unreported, and is annexed hereto as Appendix F.

JURISDICTION

The judgment and order of the Court of Appeals sought to be reviewed was entered on February 1, 2000. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved in this case:

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to be deprived of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On October 1, 1962, at age seventeen, petitioner was arrested in San Diego, California in connection with a federal Dyer Act violation. On October 15, 1962, in the United States District Court for the Southern District of California, he was adjudicated a juvenile delinquent pursuant to 18 U.S.C. § 5032 and was placed on probation under provisions of the Youth Minority Act.

On March 21, 1963, at age eighteen, petitioner was sentenced to a term of three years in the Louisiana State Penitentiary for the offense of carnal knowledge of a juvenile. On June 20, 1963, in the United States District Court for the Eastern District of Louisiana, petitioner's federal probation was formally revoked as a result of the state conviction and he was remanded to the custody of the United States Attorney General.

Following his release from the Dyer Act sentence upon reaching the age of twenty-one years, petitioner was thereafter arrested on December 11, 1965, for a murder offense that occurred in East Baton Rouge Parish, State of Louisiana. He was convicted of that offense on June 11, 1966, and sentenced to death. Petitioner subsequently was re-sentenced to life imprisonment on November 24, 1972.

Between 1979 and 1990, the Baton Rouge Division of Probation and Parole submitted several "Clemency Investigation Reports" to the Louisiana Board of Pardons in connection with various clemency applications filed by the petitioner. Those reports counted the October 15, 1962 juvenile delinquency adjudication as one felony conviction and the June 20, 1963 probation revocation as a second, independent felony conviction. That misinformation resulted in the Department of Corrections (DOC) listing petitioner as

a fourth felony offender in his "Master Prison Record" instead of a proper listing as a second offender.

In 1992, petitioner filed a request for an administrative remedy pursuant to La.R.S. 15:1171, challenging the designation of the federal juvenile delinquency adjudication as an adult felony on his DOC "Master Prison Record". On November 20, 1992, the administrative remedy was granted, as follows:

> "First, the juvenile conviction you refer to cannot be listed as an adult felony conviction. Therefore, that conviction has been deleted as a prior conviction and will not be used to determine your offender classification. Your offender classification had been changed from a fourth to third felony offender."

More that two years later, the DOC Records Custodian conducted an administrative review of petitioner's DOC "rap sheet" and concluded that the Baton Rouge Division of Probation and Parole had improperly counted the June, 1963 probation revocation as an independent adult felony conviction. Accordingly, on June 17, 1994, the DOC amended petitioner's "Master Prison Record" changing his felony offender status from third to second.

Despite its knowledge of the above amendments to petitioner's DOC "Master Prison Record", the Baton Rouge Division of Probation and Parole refused to conform its own records to accurately reflect petitioner's offender classification status. Instead, it continued to treat his federal juvenile delinquency adjudication as an adult felony and to carry him as a third felony offender. The Louisiana Board of Parole, even though the DOC Records Custodian refused to verify the third offender classification status which had been submitted to it by the Division of Probation and Parole,

nevertheless relied upon the Division's pre-parole report and it, too, treated petitioner as a third felony offender for parole consideration purposes.

On July 14, 1994, and pursuant to La.R.S. 15:574 (A) (3), petitioner appeared for a parole release hearing before the Louisiana Board of Parole. Although petitioner provided the Board with overwhelming evidence of his complete rehabilitation, as well as proof that it had granted release to many similarly situated applicants whose record of rehabilitation could not match his own, the Board denied his application.

In so denying the petitioner parole, the Board also relied upon the erroneous criminal history information that indicated petitioner was a third felony offender, when, in fact, he was only a second felony offender. The Parole Board gave as reasons for denial, the following: serious nature of the offense; police and/or juvenile record; prior felony conviction(s); and law enforcement and/or judicial objection.

Petitioner thereafter filed a *pro se* application for a writ of *habeas corpus* in the 19th Judicial Court for East Baton Rouge Parish challenging the parole denial. The *habeas corpus* petition raised the same due process claims as were subsequently presented to the United States District Court and to the Court of Appeals for the Fifth Circuit.

The 19th Judicial District Court, after converting the *habeas corpus* application into a petition for judicial review, and without conducting an evidentiary hearing upon the issues raised therein, dismissed the petition on the grounds that La.R.S. 15:574.11 stood as a bar to any appeal from a decision of the Parole Board.

Petitioner thereupon perfected an appeal to the Louisiana Court of Appeal, First Circuit. That court, in denying relief, held that while petitioner is a "... fully rehabilitated inmate", he nevertheless did not enjoy a "... constitutionally protected expectation of release under the current state of law." Sinclair v. Kennedy, 701 So.2d 457, 462 (La. App. 1 Cir. 1997). Supervisory writs were thereafter denied by the Louisiana Supreme Court. *See*, Sinclair v. Kennedy, 717 So.2d 654 (La. 1998).

Petitioner thereafter filed, in the United States District Court for the Middle District of Louisiana, a "Petition for Writ of *Habeas Corpus* under 28 U.S.C. § 2241 (D) By a Person in State Custody." The Magistrate Judge, after converting petitioner's *habeas corpus* petition into a 42 U.S.C. § 1983 complaint, issued a "Magistrate Judge's Report" in which he dismissed petitioner's complaint pursuant to 28 U.S.C. § 1915 (e) (B) (i) and (ii).

By decision dated March 18, 1999, the District Court adopted the central holding of the "Magistrate Judge's Report", and ruled, additionally, that inasmuch as the petitioner was not proceeding *in forma pauperis*, his complaint could not be dismissed pursuant to 28 U.S.C. § 1915(d); rather the District Court dismissed the complaint as "frivolous" under 28 U.S.C. § 1915A.

Petitioner thereafter timely perfected his appeal to the Fifth Circuit Court of Appeals. By panel decision filed December 27, 1999, the Court held that because petitioner had "... failed to show a constitutionally protected liberty interest under the Louisiana parole statutes or other statutes encouraging the rehabilitation of inmates", his complaint must be dismissed as frivolous under 28 U.S.C. § 1915A. Petitioner's "Petition for Rehearing *En Banc*" was denied by Order of the Fifth Circuit filed on February 1, 2000.

REASONS FOR GRANTING THE WRIT

I - SUPREME COURT DECISIONS CONCLUSIVELY ESTABLISH THAT THE PETITIONER ENJOYED A CONSTITUTIONALLY PROTECTED "LIBERTY INTEREST" IN THE STATE OF LOUISIANA'S PAROLE PROCESS. THE FAILURE OF THE COURTS BELOW TO RECOGNIZE AND THEN APPLY THAT CONTROLLING AUTHORITY TO THIS CASE PLACES THE FIFTH CIRCUIT IN CLEAR AND DIRECT CONFLICT WITH THE SUPREME COURT.

Petitioner overwhelmingly demonstrated, and the Louisiana Board of Parole and Louisiana state courts expressly noted their agreement, that he is a fully rehabilitated prisoner. That fact notwithstanding, the Parole Board in this case refused to grant petitioner's application for parole based upon reasons having nothing whatever to do with his demonstrated rehabilitation, and in reliance upon a grossly and prejudicially erroneous history of his criminal record.

The issue raised by this petition, then, is whether the Parole Board's denial of parole release to the petitioner - given the factors of his proven record of rehabilitation, the mandatory "shall" language contained in the Louisiana parole statute which creates a presumption for release upon satisfaction of certain criteria, petitioner's "Act 790" offender status, and the Board's reliance upon erroneous offender status information critical to its determination – is subject to judicial scrutiny under federal due process standards and, if so, whether the Board's decision to deny parole in this case violated those standards.

Two Supreme Court decisions which should have controlled resolution of the issues presented for review in this

case were simply ignored by the courts below. Not only did those courts fail to recognize and apply this controlling Supreme Court authority, but the Fifth Circuit compounded the error by badly misapplying its own authority. These failures not only place the Fifth Circuit in decisional conflict with the Supreme Court (and other Circuit courts) on critically important constitutional issues, but they improperly extend the reach of a prior Fifth Circuit decision to effectively bar federal court review of state conduct which would otherwise be the subject of federal due process scrutiny under controlling Supreme Court law.

The Louisiana parole release statutory scheme presents an anomaly in the Fifth Circuit when compared to those statutory schemes found in the other states lying within the Fifth Circuit's appellate jurisdiction. In terms of the scope of permitted federal review of a state's parole release decision making process, the Louisiana scheme presents a distinction with a profound constitutional difference.

La.R.S. 15:574.4(E) provides:

> "... [A] parole **shall** be ordered for the best interest of society, not as an award of clemency, and upon determination by the board that there is a reasonable probability that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen so that he can be released without detriment to the community or to himself." (Emphasis Supplied)

In addition to so circumscribing the Parole Board's discretion by directing that parole release is to be granted when the identified substantive predicates have been met, the Louisiana legislature also has defined parole as "...an administrative device for the rehabilitation of prisoners" (La.R.S. 15:574.11(A)) and, as well, has imposed a specific mandate on the Louisiana Department of Corrections to

direct every effort toward the rehabilitation of inmates so they can be returned to the "... community as promptly as practicable." *See*, La.R.S. 15:828 (A) (1).

Finally, and not least, petitioner made application for parole under La.R.S. 15:574 (A)(3) (also known as Act 790, or the "Old Timer's Law"), an act passed by the Louisiana legislature in 1990, the express purpose of which was to accelerate the release of fully rehabilitated prisoners who are forty-five years of age or older and who have served at least twenty years on a sentence of thirty or more years.

A mandatory "shall" language parole release scheme such as that found in Louisiana, with its attendant statutory emphasis on the obligation of the paroling authority to release prisoners who have demonstrated their rehabilitation, has attracted past Supreme Court attention.

Twenty years ago, in Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 12, 99 S.Ct. 2100, 2106 (1979), this Court held that state prisoners do not have a constitutionally protected "liberty interest" in parole "unless" the discretion of the parole board is limited by mandatory language. After concluding that the Nebraska parole statutes involved indeed conferred a protected "liberty interest" upon those applicants who sought relief thereunder, the Court held that "liberty interest" issues in state parole determinations would henceforward be determined on a case-by-case basis. *Id.*

Eight years later, in Board of Pardons v. Allen, 482 U.S. 369, 107 S.Ct. 2415 (1987), the Supreme Court revisited the issue of the due process protections which attend state parole release processes, and significantly expanded its earlier holding in Greenholtz. The Allen court held that the use of mandatory "shall" language in a state parole statute in fact creates a constitutionally protected "liberty interest" and

that a state's parole regulations might require release after a parole board "... determines (in its broad discretion) that the necessary prerequisites exist." Board of Pardons v. Allen, *supra*, 482 U.S. at p. 376.

The Montana parole statute at issue in the Allen case contained three "subjective and predictive" prerequisites for release, the sum of which were strikingly similar to those contained in the Nebraska statute which came under review in Greenholtz. These included: (i) reasonable probability that the offender can be released without detriment to himself or others; (ii) the parole shall be ordered only for the best interest of society and not as an award of clemency; and (iii) the offender is wiling to live a law abiding life upon release. *See,* Board of Pardons v. Allen, *supra*, 482 U.S. at pp. 336-67.

As similar in scope and language as the parole statutes in Montana (in Allen) and Nebraska (in Greenholtz) were to one another, the parallels of language found in the Montana parole statute and the Louisiana parole statute under review in this case, are yet more compellingly apparent. *Compare,* La.R.S. 15:574.4 (E), *supra.*

Clearly, the actions of the Louisiana paroling authority complained of in this case fall under the due process review standards enunciated in the Greenholtz and Allen cases. Yet, inexplicably, the courts below failed to even mention those Supreme Court holdings, much less to attempt to reconcile them with the decisions reached in this case.

The Fifth Circuit has not reviewed the Louisiana parole statute, or its companion criminal corrections statutes mentioned above, under the standard of review enunciated by the Supreme Court in Board of Pardons v. Allen, *supra.* Nor, more particularly, has it been presented with the claim of a

fully rehabilitated, Act 790 prisoner who asserts that, under Allen, he is specially vested with a constitutionally protected "expectation" of parole release under that state's mandatory parole review language and its more generic statutory emphasis favoring the release of a particular class of fully rehabilitated prisoners.

In contrast, the Louisiana state courts **have** examined their statutory parole scheme in light of Allen and its progeny and have concluded, despite that decision, that federal due process does not apply to agency determinations made thereunder. The Louisiana Supreme Court, in Bosworth v. Whitley, 627 So.2d 629 (La. 1993), initially considered whether La.R.S. 15:574.4(E) created a constitutionally protected liberty interest for a group of prisoners who were serving life sentences. Citing to the Greenholtz and Allen cases, the court held "... it is apparent that the Louisiana parole statutes do not create an expectancy of release or liberty interest in general, or for those with life terms in particular." Bosworth v. Whitley, *supra,* 627 So.2d. at p. 633.

In Sinclair v. Kennedy , 701 So.2d 457, 462 (La. App. 1 Cir. 1997) , the First Circuit Court of Appeals actually extended the Bosworth rule by holding that the Louisiana parole scheme does not even require that a "fully rehabilitated" inmate be paroled.

Both the Bosworth and Kennedy decisions stand in clear and direct conflict with Board of Pardons v. Allen, *supra.* The Allen court quoted with approval the "Statement of the Attorney General of Montana" that once the Montana Parole Board determined that release could "... occur consistently with the three criteria the state specifies, then under our law the Board is required to order release." Board of Pardons v. Allen,, *supra,* 482 U.S at p. 377.

While most states have removed mandatory "shall" language from their parole statutes, Louisiana pointedly has elected to maintain its mandatory "shall" language parole statute, having added that language in a 1968 amendment to its statute and, in the process, actually eliminating that portion of the prior, 1948 statute which contained the permissive "may" language. Further, as noted, it later chose to augment that statute with additional mandatory "shall" language for the purpose of accelerating the parole eligibility of Act 790 inmates such as the petitioner.

Significantly, in those states, such as Louisiana, which have elected to maintain their mandatory "shall" language parole statutes, federal courts have consistently found that a protected, due process "liberty interest" resides in the administration of those statutes. *See e.g.*, Bermudez v. Duenas, 936 F.2d 1064, 1067 (9th Cir.1991); Watson v. DiSabato, 933 F. Supp. 390, 392 (D.N.J. 1996). As those courts recognized, the Supreme Court's precedent in Board of Pardons v. Allen, *supra,* demands no less.

In denying petitioner relief, the Fifth Circuit relied upon its decision in Johnson v. Rodriquez, 110 F.3d 299 (5th Cir. 1997), *cert. den.*, 520 U.S. 1267, 118 S.Ct. 559 (1997). But the constitutional issues raised by this case are clearly and compellingly distinguishable from the issues considered by the Fifth Circuit in Johnson in terms of the parole statute involved and its operative mandatory release language, the express violations of federal and state laws involved herein, and in the underlying facts.

First, and most important, petitioner has shown that, unlike the Texas parole statute under review in Johnson, the Louisiana mandatory language parole statute confers on this petitioner "a cognizable liberty interest" satisfying even the quite restrictive due process standard of review test set forth in that very case. Johnson v. Rodriquez, *supra,* 110 F.3d at

p. 309, n. 13. In fact, it was the very absence of such a "cognizable liberty interest" in the Texas parole statute which led the Fifth Circuit to eschew review and analysis under a federal due process test; rather its disposition of that claim was pointedly limited to review as a possible violation of the Equal Protection Clause and, in that constitutional context, was found wanting. *Id.*, at pp. 306-09.

Second, and assuming now that the Fifth Circuit was required to review and analyze the petitioner's "false information" claims in the context of a due process challenge (casting this case into a far different and constitutionally more profound analytical realm than was present in Johnson), those claims raise grave federal issues regarding the Parole Board's improper consideration of petitioner as a third felony offender, and its denial of parole release on that basis.

Federal jurisprudence has long held that to be adjudicated as a juvenile delinquent under 18 U.S.C. § 5031 "... is not to be convicted of or sentenced for a crime...[T]he very purpose of the Act is to avoid the prosecution of juveniles as criminals." *See,* Fagerstrom v. United States, 311 F. 2d 717, 720 (8th Cir. 1963). Moreover, 18 U.S.C § 5038(a) provides that juvenile delinquency adjudication records generated under 18 U.S.C. § 5032 "shall be safeguarded from disclosure to unauthorized persons." The six exceptions for disclosure set forth in 18 U.S.C. § 5038(a) do not include state parole boards and their related agency proceedings.

Any use of the juvenile delinquency adjudication by the Louisiana Board of Parole (much less counting that adjudication as an adult felony conviction) violated not only the provisions of 18 U.S.C. § 5038 (a) but also contravened provisions of La.R.S. 15:596 (B) which prohibit the Parole Board either from acquiring or distributing unauthorized

criminal history information. (*See*, La.R.S. 15:576(3), defining the parole board as a "criminal justice agency".)

In addition to violating the foregoing federal and state laws, the Parole Board's use of the false criminal history information also violated its own internal rules. The "Rules, Regulations, Criteria, Procedures and Guidelines of the Louisiana Board of Parole", Regulation V (E) (October 13, 1978) then in effect, provided that:

> "... [t]he authority for determining parole eligibility, **offender class**, good time release dates and full term dates will be the **official master prison record** computed by the Louisiana Department of Corrections. The board will accept changes in offender class and parole eligibility dates when corrected by the Division of Probation and Parole and **verified by the records custodian**." (Emphasis supplied)

See, Pickens v. Butler, 814 F.2d 237, 240 (5th Cir. 1987) (Unless [these] regulations conflict with affirmative legislative enactments, they have the effect of law because they were obviously adopted by the Board under its authority to administer parole).

In sum, the Louisiana Board of Parole, by utilizing this false criminal history in its parole deliberations, violated 18 U.S.C. § 5038(a), La.R.S. 15:596(B), the 1992 administrative review ruling, and its own then extant rules of procedure. This unlawful action by the Board had a grievous and prejudicial impact on petitioner's prospects for obtaining favorable parole release consideration. La.R.S. 15:574.4(A)(1) provides that "... a person convicted of a third or subsequent felony and committed to the Department of Public Safety and Corrections shall not be eligible for parole." Put otherwise, the Parole Board is not in the

business of paroling third felony offenders, a class of applicants to which this petitioner clearly does not belong.

Petitioner's claims, then, do not simply allege, as a basis for relief, mere parole board use of victims' protest letters and/or prejudicial treatment due to "writ-writing" activities. *See*, Johnson v. Rodriguez, *supra*. Rather, petitioner argues that he was erroneously and, he alleges, knowingly, cast as a third felony offender, the improper use of which classification unquestionably (*see*, La.R.S. 15:574.4 (A)(1)) influenced the Parole Board to deny him favorable parole consideration. Such claims, which involve violations of various federal and state remedial statutes, go to the very core of the fairness of the hearing conducted by the Parole Board in petitioner's case, and neither Johnson, *supra*, nor that Court's due process analysis contained therein, defeats the viability of such claims.

This court should also note that the Eleventh Circuit, in Monroe v Thigpen, 932 F. 2d 1437, 1442 (11th Cir. 1991), specifically has held that even in the absence of a cognizable liberty interest, a state prisoner has standing under the Due Process Clause to challenge a "flagrant and unauthorized" state parole board action (*e.g.*, improper classification of applicant as a sex offender on the basis of admittedly false information). This ruling stands in direct conflict with that of the Fifth Circuit which has held that "... in the absence of a cognizable liberty interest, a state prisoner cannot challenge parole procedures under the "Due Process Clause". Johnson v. Rodriguez, *supra*, 110 F. 3d at p. 309, n. 13.

The harm to this petitioner, incurred by reason of the refusal of the District Court and the Fifth Circuit to recognize his protected liberty interests in the Louisiana parole process and to review the within appeal under the proper standard, could hardly be more profound.

Petitioner demonstrated his complete rehabilitation to the Parole Board, a fact which was later expressly confirmed by the courts of the State of Louisiana. *See,* Sinclair v. Kennedy, 701 So.2d 457, 462 (La. App.1 Cir. 1997). Moreover, petitioner presented documentation showing that the Parole Board had exhibited a pattern of paroling similarly situated offenders who had served far less time than he and with far lesser records of achievement. Finally, and perhaps most telling, petitioner showed that the Parole Board, in connection with its release deliberations, erroneously treated him as a third, rather than a second, felony offender.

Petitioner was vested with federal Due Process protections in connection with his July, 1994 appearance before the Louisiana Parole Board. That Board's denial of parole release to petitioner, given his record of complete rehabilitation, Act 790 parole application status, and second offender status, violated those due process rights and his constitutionally-derived expectation of release.

II – PETITIONER WAS DEPRIVED OF HIS ACCESS TO THE COURTS BY REASON OF THE LOWER COURTS' IMPROPER CHARACTERIZATION OF HIS 42 U.S.C. § 1983 ACTION AS "FRIVOLOUS" UNDER 28 U.S.C. § 1915A.

28 U.S.C. § 1915 (d) (2) (B) (1) provides, in pertinent part:

> "... notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines... the action or appeal... is frivolous or malicious."

This Court, in Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 1833 (1989), provided guidelines for dismissal of a cause of action under the "frivolous or malicious" rationale of 28 U.S.C. § 1915 (d) holding that a court may dismiss an action as "factually frivolous" only if the facts are "clearly baseless". The Neitzke court said that the allegations, to support such dismissal, must be "fanciful" (*id.* at p. 325); "fantastic" (*id.* at p. 328); or "delusional". *Id.* *See also*, Denton v. Hernandez, 504 U.S. 25, 112 S.Ct. 1728 (1992).

The Fifth Circuit, in Talib v. Gilley, 138 F.3d 211, 213 (5th Cir. 1998), summarized the dismissal standard contained in 28 U.S.C. § 1915, as follows:

> "An IFP complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact. *See*, 28 U.S.C. § 1915 (e) (2) (B) (i); Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994). A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. *See*, Siglar v. Hightower, 112 F, 3d 191, 193 (5th Cir. 1997). A complaint lacks an arguable basis in fact, if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless. *See*, Denton v. Hernandez, 504 U.S. 25, 32-33, 112 S.Ct. 1728, 1733-34 (1992). This court reviews dismissals as frivolous for an abuse of discretion. *Id.*"

Previously, in Moore v. Mabus, 976 F.2d 268 (5th Cir. 1992), the Fifth Circuit had reviewed this issue in the context of a 42 U.S.C. § 1983 *in forma pauperis* action commenced by a state prisoner wherein he alleged that various of his constitutional rights had been violated by his discriminatory treatment at the hands of prison authorities due solely to his HIV status. The lower court had dismissed that plaintiff's claims as frivolous pursuant to 28 U.S.C. §

1915 (d). Moore reaffirmed that a Section 1915 (d) dismissal is reviewable for an abuse of discretion, and that the reviewing court may consider whether:

> "...(1) the plaintiff is proceeding *pro se*, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided a statement of reasons which facilitates 'intelligent appellate review', and (5) any factual frivolousness could have been remedied through a more specific pleading." Moore v. Mabus, *supra*, 976 F.2d at p. 270.

Under the standards set forth in the Fifth Circuit's Talib and Moore cases, petitioner's action cannot be deemed to constitute a "frivolous" action with respect to either its factual assertions or the legal claims raised. Petitioner, proceeding *pro se* up to the level of the Fifth Circuit appeal, demonstrated that the lower courts: (i) "... inappropriately resolved genuine issues of fact" (*ie*., whether and to what extent the use of false criminal history information affected the fairness of the parole hearing); (ii) "... applied erroneous legal conclusions" (*ie*., failed to recognize due process entitlements in the Louisiana parole process); and (iii) failed to "... provide a statement of reasons which facilitates 'intelligent appellate review'" (*ie*., by summarily dismissing petitioner's claims without requiring issue to be joined thereon and a hearing to be conducted). *See*, Moore v. Mabus, *Id.*

In Denton the Supreme Court found that a "...frivolousness determination, frequently made *sua sponte* before the defendant had ever been asked to file an answer, cannot serve as a fact-finding process for the resolution of disputed facts." Denton v. Hernandez, *supra*, 112 S.Ct. at p. 1733. Inasmuch as the District Court could not point to any controlling precedent by which the claims of the petitioner

herein were subject to outright dismissal, those claims certainly could not be deemed to be "frivolous" ones. *See e.g.*, Martin v. Scott, 156 F. 3d 578 (5th Cir. 1998). The District Court and the Fifth Circuit, therefore, abused their discretion by so holding under color of 28 U.S.C. § 1915A. In so doing, those courts effectively barred this petitioner from having a fair and impartial judicial review of his claims – a deprivation that strikes at the very heart of venerable entitlements promised to all citizens by the clear and unequivocal language of the United States Constitution.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

A1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-30310

BILLY SINCLAIR

Plaintiff-Appellant

v.

KELLY WARD and RICHARD P. IEYOUB

Defendants-Appellees

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING EN BANC

(Opinion 12/27/99, 5 Cir., _____, _____ F.3d _____

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP.P. and 5TH CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is

DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED.R.AFP.P. and 5TH CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

* Judges Wiener and Benavides did not participate in the consideration of the petition for rehearing en banc.

REHG- 6a

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99—30310
Summary Calendar

BILLY SINCLAIR,

Plaintiff-Appellant,

Versus

KELLY WARD and RICHARD P. IEYOUB,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana

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Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:*

Billy Sinclair argues that the district court erred in construing his petition for writ of habeas corpus, challenging the denial by the parole board of his application for parole release, as a complaint filed pursuant to 42 U.S.C. § 1983. "Section 1983 is an appropriate legal vehicle to attack unconstitutional parole procedures." *Orellana v. Kyle,* 65 F.3d 29, 31 (5th Cir. 1995) (internal quotation and citation omitted). A prisoner must pursue, by habeas writ, a challenge to the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

result of a specific defective parole hearing or a parole board's rules and procedures that would automatically entitle him to accelerated release. Id. A claim that has an indirect impact on whether a prisoner eventually receives parole may be cognizable under § 1983, however. Id. The distinction is between claims that would "merely enhance eligibility for accelerated release and those that would create entitlement to such relief." *Cook v. Texas Dep't off Criminal Justice Transitional Planning Dep't*, 37 F.3d 166, 168 (5th Cir. 1994) (citation omitted).

Sinclair asserts a liberty interest in parole release but also is challenging the parole board's procedure of relying on incorrect criminal history erroneously contained in his parole file. He is seeking to have the record corrected so that the parole board will be aware of his correct offender status when considering any requests for parole release. If he is successful, it would merely result in his receiving a new parole hearing during which the correct information regarding offender status would be considered. Because a successful resolution of his claim may only enhance his eligibility for an enhanced accelerated release, his pleadings were properly construed as a §1983 complaint.

Sinclair has failed to show a constitutionally protected liberty interest under the Louisiana parole statutes or other statutes encouraging rehabilitation of inmates. Therefore, even assuming the parole board knowingly has relied on incorrect information regarding his criminal history, he cannot challenge the board's procedures under the Due Process Clause. See *Johnson v. Rodriguez,* 110 F.3d 299, 308—09 & n.13 (5th Cir. 1997).

Because Sinclair has failed to show that the district court erred in dismissing his complaint as frivolous under 28 U.S.C. § 1915A, the judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30310

BILLY SINCLAIR,

Plaintiff-Appellant,

versus

KELLY WARD, RICHARD P. IEYOUB,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(98- CV -688)

Before POLITZ, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:

During the pendency of Appellant's petition for rehearing en banc, each member of the panel determined to recuse himself from participation in the disposition of this case on appeal. Therefore, the panel's opinion dated October 25, 1999 is VACATED, and the Clerk is DIRECTED to reassign this case to another panel of this Court.

VACATED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30310
(Summary Calendar)

BILLY SINCLAIR,

Plaintiff-Appellant,

versus

KELLY WARD,
RICHARD P. IEYOUB,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(98 - CV -688)

Before POLITZ, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Billy Sinclair, Louisiana state prisoner # 064373 N-5-B-4, argues that the district court erred in construing his habeas petition challenging the Louisiana State Board of Paroles' (Parole Board) denial of his application for parole release as a 42 U.S.C. § 1983 complaint.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R.47.5.4.

"Section 1983 is an appropriate legal vehicle to attack unconstitutional parole procedures." *Orellana v. Kyle*, 65 F.3d 29, 31 (5th Cir. 1995) (internal quotation and citation omitted). A prisoner must pursue by a writ of habeas corpus a challenge to the result of a specific defective parole hearing or a parole board's rules and procedures that would automatically entitle him to accelerated release. Id. However, a claim that has an indirect impact on whether a prisoner eventually receives parole may still be cognizable under § 1983. Id. The distinction is between claims that would "merely enhance eligibility for accelerated release and those that would create entitlement to such relief." *Cook v. Texas Dep't of Criminal Justice Transitional Planning Dep't*, 37 F.3d 166, 168 (5th Cir. 1994) (citation omitted)

Sinclair is asserting a liberty interest in parole release but is also challenging the Parole Board's procedure of relying on incorrect criminal history erroneously contained in his parole file. He is seeking to have the record corrected so that the Parole Board will be aware of his correct offender status when considering his future requests for parole release. If Sinclair is successful in his claims, it would merely result in his receiving a new parole hearing during which the correct information regarding offender status would be considered. Because a successful resolution of his claim may only enhance his eligibility for an enhanced accelerated release, his pleadings were properly construed as a § 1983 complaint.

Sinclair has failed to show that he has a constitutionally protected liberty interest under the Louisiana parole statutes or other state statutes encouraging the rehabilitation of inmates. Therefore, even assuming that the Parole Board has knowingly relied upon incorrect information regarding Sinclair's criminal history, he is not entitled to challenge the parole procedures employed under the Due Process Clause. See *Johnson v. Rodriguez*, 110 F.3d 299 308-09 & n.13 (5th Cir. 1997)

Sinclair has failed to show that the district court erred in dismissing his complaint as frivolous pursuant to 28 U.S.C. § 1915A.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BILLY SINCLAIR
(#64373)

VERSUS

RICHARD L. STALDER

CIVIL ACTION NO. 98-688-A

JUDGMENT

For written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that this action is hereby DISMISSED as frivolous and for failure to state a claim within the meaning of 28 U.S.C. §§ 1915A(b)(1).

Baton Rouge, Louisiana, March 25, 1999.

JOHN V. PARKER, JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BILLY SINCLAIR (#64373)

VERSUS

RICHARD STALDER

CIVIL ACTION
NO. 98-688-A

RULING

The court has carefully considered the record, the law applicable to this action, and the Report and Recommendation of United States Magistrate Judge Stephen C. Riedlinger, dated February 18, 1999. Plaintiff has filed an objection which largely restates his legal arguments and does not require de novo findings under 28 U.S.C. §636.

However, plaintiff correctly observes that because he paid the full filing fee, the suit cannot be dismissed pursuant to the in forma pauperis statute, 28 U.S.C. §1915. Rather, the recommended dismissal for being frivolous and failing to state a claim must be entered pursuant to 28 U.S.C. §1915A, which is not dependent upon in forma pauperis status.

The court hereby approves and adopts the report and recommendation of the magistrate judge with the correction noted above. The court further supplements the reasons given by the magistrate judge relative to plaintiff's claims that the Parole Board relied upon an "uncounseled prior conviction" as well as "false criminal history information". While the magistrate judge fails to expressly address these claims, absent a protected liberty interest, plaintiff cannot maintain a §1983 action (or a petition for habeas) based upon alleged

deprivations of procedural due process. *Johnson v. Rodriguez,* 110 F.3d 299 (5th Cir. 1997), *cert. denied,* ___ U.S. 118 S.Ct. 559, 139 L.Ed.2d 400 (1997). The magistrate judge's report adequately explains why plaintiff has no protected liberty interest.*

Accordingly, plaintiffs complaint will be dismissed as frivolous and for failure to state a claim pursuant to 28 U.S.C. §1915A(b)(1).

Baton Rouge, Louisiana, March 18, 1999.

JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

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* Additionally, the court observes that plaintiffs reliance upon *Cook v. Texas Dept. of Criminal Justice Transitional Planning Dept.*, 37 F.3d 166 (5th Cir.1994) is misplaced since that case merely holds that "when a conviction has been... judicially nullified a prisoner may obtain an order enjoining use of the voided conviction in a parole hearing." Id at p. 308. As there is no prior judgment to enforce, plaintiff must first establish a protected liberty interest to complain of the procedures employed by the Parole Board under §1983.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BILLY SINCLAIR (#64373)

VERSUS

RICHARD STALDER

CIVIL ACTION NUMBER 98-688-A-i

MAGISTRATE JUDGE'S REPORT

Pro se plaintiff, an inmate at Wade Correctional Center, Homer, Louisiana, filed this action pursuant to 28 U.S.C. §2241 against Louisiana Department of Public Safety and Corrections Secretary Richard L. Stalder. The gist of the complaint is that the Louisiana Board of Parole violated the plaintiff's due process rights by maintaining in its files inaccurate information regarding the plaintiff's criminal history. Additionally, the plaintiff argued that his due process rights were violated because the board failed to release him on parole even though he is a "fully rehabilitated" prisoner. Plaintiff seeks injunctive relief only.

Claims attacking unconstitutional parole procedures are cognizable under 42 U.S.C. § 1983. *Cook v. Texas Dep't of Criminal Justice Transitional Planning Dep't,* 37 F.3d 166, 168 (5th Cir. 1994) . Challenges to the result of a specific defective parole hearing or to a parole board's rules and procedures that affect a prisoner's release, the resolution of which would automatically entitle the prisoner to accelerated release, must be pursued by a writ of habeas corpus. Id. A

claim that has an indirect impact on whether a claimant eventually receives parole may be cognizable under section 1983. Id.

Plaintiff's claims are more properly brought pursuant to section 1983 because the resolution of the claims would not automatically entitle the plaintiff to release. Plaintiff acknowledged in his complaint that at most he is entitled to a new parole hearing. Because the complaint neither challenges the validity of the plaintiff's criminal conviction or the duration of his confinement, the claims are more appropriately raised pursuant to 42 U.S.C. § 1983.[4]

On April 26, 1996, the President signed into law the Prison Litigation Reform Act, Pub. L. No. 104—134, 110 Stat. 1321, which amended: 18 U.S.C. §§ 3624(b), 3626; 42 U.S.C. § 1997e; 28 U.S.C. 1915, 1346(b); and 11 U.S.C. § 523(a).

Subsection (c) (1) of 28 U.S.C. § 1997e was amended to provide the following:

"(c) Dismissal.--(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief."

An in forma pauperis suit is properly dismissed as frivolous if the claim lacks an arguable basis either in fact or in

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[4] Even if the claims were considered under the habeas corpus statutes, the plaintiff would not prevail because he has no federal right to parole and is not being held in custody in violation of a federal right.

law. *Denton v. Hernandez,* 504 U.S. 25, 112 S.Ct. 1728, 1733 (1992); *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 1831—32 (1989); *Hicks v. Garner,* 69 F.3d 22, 24 (5th Cir. 1995) . A court may dismiss a claim as factually frivolous only if the facts are clearly baseless, a category encompassing allegations that are fanciful, fantastic, and delusional. *Denton,* 504 U.S. at 33—34, 112 S.Ct. at 1733. Pleaded facts which are merely improbable or strange, however, are not frivolous for section 1915(d) purposes. id.; *Ancar v. SARA Plasma, Inc.,* 964 F.2d 465, 468 (5th Cir. 1992). Dismissal under 28 U.S.C. §1915(d)[5] 2 may be made at any time before or after service of process and before or after an answer is filed. *Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986)

The court must accept as true the plaintiff's allegations and may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim which would entitle him to relief. *Boudeloche v. Grow Chemical Coatings* CorD., 728 F. 2d 759 (5th Cir. 1984)

Plaintiff alleged that his due process rights were violated when the Parole Board relied on inaccurate information regarding the plaintiff's criminal history to deny him release on parole. Plaintiff further alleged that he is a rehabilitated inmate who is statutorily entitled to parole.

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[5] On April 26, 1996, the President signed into law the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, which amended: 18 U.S.C. §§ 3624(b), 3626; 42 U.S.C. § 1997e; 28 U.S.C. §§ 1915, 1346(b); and 11 U.S.C. § 523(a). The amendments also add provisions, including new sections 1915 and 1932 to title 28, United States Code. Pursuant to the April 26, 1996 amendment to 28 U.S.C. § 1915, subsection (d) was redesignated as subsection (e)

Plaintiff named Secretary Stalder as a defendant but made no factual allegations against him. To be liable under section 1983, a person must either be personally involved in the acts causing the alleged deprivation of constitutional rights, or there must be a causal connection between the act of that person and the constitutional violation sought to be redressed. *Lozano v. Smith*, 718 F.2d 756 (5th Cir. 1983)

Even if the plaintiff had named the individual Parole Board members as defendants, his claims would nonetheless be subject to dismissal. Because the plaintiff has no constitutional right to release on parole, the complaint fails to state a constitutional violation.[6]

Inmates have no constitutional or inherent right to parole. *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103 (1979) . To obtain a protectable right, a person must have more than an abstract need, desire, or unilateral expectation of the interest at stake; he must have a legitimate claim of entitlement to it. Id. at 442 U.S. 1, 7 (1979), citing *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 570—71, 92 S.Ct. 2701, 2705—06 (1972) . That the state holds out the possibility of release on parole provides no more than a mere hope that the benefit will be obtained. The prisoner's hope of discretionary early release is not protected by the Fourteenth Amendment. Thus, any rights the plaintiff claims to possess with regard to release on parole must derive from state law.

A state creates a protected liberty interest by placing substantive limitations on official discretion. *Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741 (1983). The most common manner in which a state creates a liberty interest is

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[6] Members of the Louisiana State Board of Parole have absolute immunity from section 1983 damages. *Serio v. Members of La. State Bd. of Pardons,* 821 F.2d 1112 (5th Cir. 1987); *Johnson v. Kegans,* 70 F.2d 992 (5th Cir. 1989)

by establishing "substantive predicates" to govern official decision making and by mandating the outcome to be reached upon a finding that the relevant criteria have been met. *Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 109 S.Ct. 1904 (1989); *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864 (1983).

Louisiana Revised Statute 15:574.4, et seq, creates at most a possibility of parole by providing "no more than a mere hope that the benefit will be obtained . . . a hope which is not protected by due process." *Gilbertson v. Texas Bd. Of Pardons and Paroles,* 993 F.2d 74, 75 (5th Cir. 1993), quoting *Greenholtz* at 442 U.S. 11, 99 S.Ct. 2105 (addressing Texas parole statutes)

Contrary to the plaintiff's assertion, the Louisiana parole statutes do not contain language mandating the release of "fully rehabilitated" prisoners. Rather, parole is left to the unfettered discretion of the Louisiana Parole Board. LSA-R.S. 15:574.11 A ("Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint, and the granting, conditions, or revocation of parole rests in the discretion of the Board of Parole.")

In Louisiana, a prisoner cannot be paroled unless he meets the criteria set forth in LSA-R.S. 15:574.4 E which provides in pertinent part the following:

> A parole shall be ordered only for the best interest of society, not as an award of clemency, and upon determination by the board that there is reasonable probability that the prisoner is able and willing to fulfill the obligation of a law-abiding citizen so that he can be released without detriment to the community or to himself.

Nothing in the statute mandates that a prisoner be paroled if he meets the requirements set forth in LSA-R.S. 15:574.4 E.

Moreover, the standard set forth in LSA-R.S. 15:574.4 E does not curtail the unfettered discretion the board has been granted under LSA-R.S. 15:574.11.

The parole statutes vest the Parole Board with the discretion to grant or deny parole and thus precludes the creation of the liberty interest needed to assert a constitutional claim.

Plaintiff's attempt to establish a protected liberty interest by linking the provisions of the parole statutes, which do not create a protected liberty interest, with the provisions of LSA- R.S. 15:828, which he characterizes as the "rehabilitation" statute, is purposefully misleading.

Section 828 of Title 15 of the Louisiana Revised Statutes directs the Secretary of the Louisiana Department of Corrections to "establish programs of classification, diagnosis, education, casework, counseling, and psychotherapy, vocational training and guidance, work, library and religious services, and such other rehabilitation programs as he deems necessary" to facilitate rehabilitation. It has no applicable relationship to the statutes governing parole. Nonetheless, whether section 828 is read by itself or in conjunction with the parole statutes, it lacks the substantive predicates and mandatory language necessary to create a protected liberty interest in parole.

Because it is clear that the plaintiff's claims have no arguable basis in fact or in law and the allegations fail to state a claim, the complaint should be dismissed pursuant to 28 U.S.C. §1915(e) (2) (B) (i) and (ii).[7]

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[7] Section 1915 of Title 28 was amended to add subsection (g) which provides the following: "(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or Proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or

RECOMMENDATION

It is the recommendation of the magistrate judge that the plaintiff's complaint be dismissed pursuant to 28 U.S.C. §1915(e) (2) (B) (i) and (ii)

Baton Rouge, Louisiana, February 18, 1999.

UNITED STATES MAGISTRATE JUDGE

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fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."